IN THE

Supreme Court of the United States

October Term, 1975

No. 75-1157

TOWN OF LOCKPORT, NEW YORK, and FLOYD SNYDER,
Individually and as Supervisor of the Town of Lockport,
Appellants,

vs.

CITIZENS FOR COMMUNITY ACTION AT THE LOCAL LEVEL, INC.
and FRANCIS W. SHEDD, Individually and on Behalf of
All Others Similarly Situated,
Appellees,

and

JOHN J. GHEZZI, Secretary of State of the State of New York, ARTHUR LEVITT, Comptroller of the State of New York, LaVERNE S. GRAF, Clerk of the County Legislature, County of Niagara, New York and KENNETH COMERFORD, County Clerk, County of Niagara, New York,
Appellees.

APPEAL FROM A THREE JUDGE COURT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK.

BRIEF ON BEHALF OF APPELLANTS

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July, 1976.

BATAVIA TIMES, APPELLATE COURT PRINTERS
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Appeal from a Three Judge Court of the United States District Court for the Western District of New York.

BRIEF ON BEHALF OF APPELLANTS

I

The Opinions Below

The opinions below are of a three-judge District Court for the Western District of New York.

The initial opinion is reported at 386 F.Supp. 1 (A. 130-144).

The second opinion, on remand from this Court (A. 161), is not officially reported, but appears at (A. 163-7).

Jurisdiction

This suit was brought under Civil Rights Act, 42 U.S.C. § 1983 (1970) and 28 U.S.C. § 1343(3) (1970). A three judge District Court for the Western District of New York was convened pursuant to 28 U.S.C. §§ 2281 and 2284 (1970). Its initial decision was filed November 22, 1974 (A. 130). Its initial judgment was entered on January 9, 1975 (A. 145-147).

The Town of Lockport, New York and Floyd Snyder, individually as a voter of the Town of Lockport and as Supervisor of the Town of Lockport, obtained an order from the District Court on March 5, 1975 permitting intervention pursuant to Rule 24 of the Federal Rules of Civil Procedure (R. 24). Notice of Appeal to this Court from the January 9, 1975 judgment was filed and served by the intervening defendants (the appellants here) on March 6, 1975 (A. 148-149).

On October 6, 1975, this Court issued an order and judgment vacating the January 9, 1975 judgment below, and remanding the cause to the District Court for reconsideration with respect to the issue of mootness (A. 161).

On October 23, 1975, the District Court filed a decision reinstating the January 9, 1975 judgment with specified amendments (A. 163-7). A judgment implementing that decision was filed on December 15, 1975 (A. 167-170).

The jurisdiction of this Court to review these judgments on direct appeal is conferred by 28 U.S.C. § 1253.

Constitutional and Statutory Provisions Involved

The District Court has ruled that the following New York State constitutional and statutory provisions violate Section 1 of the Fourteenth Amendment to the United States Constitution.

Article IX § 1(h)(1) of the Constitution of the State of New York provides:

> § 1. BILL OF RIGHTS FOR LOCAL GOVERNMENTS
>
> Effective local self-government and intergovernmental cooperation are purposes of the people of the state. In furtherance thereof, local governments shall have the following rights, powers, privileges and immunities in addition to those granted by other provisions of this constitution:
>
> • • •
>
> (h) (1) Counties, other than those wholly included within a city, shall be empowered by general law, or by special law enacted upon county requests pursuant to section two of this article, to adopt, amend or repeal alternative forms of county government provided by the legislature or to prepare, adopt, amend or repeal alternative forms of their own. Any such form of government or any amendment thereof, by act of the legislature or by local law, may transfer one or more functions or duties of the county or of the cities, towns, villages, districts or other units of government wholly contained in such county to each other or when authorized by the legislature to the state, or may abolish one or more offices, departments, agencies or units of government provided, however, that no such form or amendment, except as provided in paragraph (2) of this subdivision, shall become effective unless approved on a referendum by a majority of the votes cast thereon in the area of the county outside of cities, and in the cities of the county, if any, considered as one unit. Where an alternative form

of county government or any amendment thereof, by act of the legislature or by local law, provides for the transfer of any function or duty to or from any village or the abolition of any office, department, agency or unit of government of a village wholly contained in such county, such form or amendment shall not become effective unless it shall also be approved on the referendum by a majority of the votes cast thereon in all the villages so affected considered as one unit (McKinney's Consolidated Laws of New York, Vol. 2, p. 509).

Section 33(7) of the Municipal Home Rule Law of New York provides:

§ 33. POWER TO ADOPT, AMEND AND REPEAL COUNTY CHARTERS

7. A charter law

(a) providing a county charter, or

(b) proposing an amendment or repeal of one or more provisions thereof which would have the effect of transferring a function or duty of the county, or of a city, town, village, district or other unit of local government wholly contained in the county, shall conform to and be subject to consideration by the board of supervisors in accordance with the provisions of this chapter generally applicable to the form of and action on proposed local laws by the board of supervisors. If a county charter, or a charter law as described in this subdivision, is adopted by the board of supervisors, it shall not become operative unless and until it is approved at a general election or at a special election, held in the county by receiving a majority of the total votes cast thereon (a) in the area of the county outside of cities and (b) in the area of the cities of the county, if any, considered as one unit, and if it provides for the transfer of any function or duty to or from any village or for the abolition of any office, department, agency or unit of government of a village wholly contained in the county, it shall not take effect unless it shall also receive a majority of all the votes cast

thereon in all the villages so affected considered as one unit. Such a county charter or charter law shall provide for its submission to the electors of the county at the next general election or at a special election, occurring not less than sixty days after the adoption thereof by the board of supervisors. Such a county charter or charter law may provide for the separate submission to the electors at such election of one or more variations of the provisions of such county charter. Any such variation may include, but shall not be limited to, proposed transfers of functions of local government to other units of local government or a class or classes thereof (McKinney's Consolidated Laws of New York, Vol. 35C, pp. 70-71).

Section 1 of the Fourteenth Amendment to the United States Constitution provides:

ARTICLE XIV

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Questions Presented

1. Is the federal judiciary authorized to circumscribe a state's sovereign power to define and to establish the form and structure of its subsidiary local governmental units by requiring—contrary to the constitution and statutes of the state—that any such form or structure be conditioned on one-person, one-vote referendum approval?

2. The New York State Constitution and the New York Municipal Home Rule Law provide that the adoption, amendment or repeal of a county charter must be approved on referendum by complementary majority votes of those voting in areas outside of the cities in the county taken as a unit and of those voting in the cities within the county taken as a unit.

Do these provisions constitute a *per se* violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution?

3. A proposed new charter for the County of Niagara failed to obtain majority approval of the votes cast in the towns of the County, but obtained majority approval of the total votes cast in the County in a November 1972 referendum. Voter participation in the referendum was on the assumption that the State Constitution and the Municipal Home Rule Law properly required approval of a majority of the votes cast within the towns of the County and a majority of the votes cast in the cities of the County, and that a simple majority of all votes cast in the County would not be sufficient to enact the new charter.

Was it appropriate or within the jurisdiction of the District Court for that Court to "change the rules after the game" by ordering that the proposed charter become effective on the basis of the November 1972 referendum, as opposed to ordering a new referendum with prior advice to eligible voters that the rules would be different and that the prescribed complementary majority votes would not be required?

4. This action was brought to obtain a declaration that a proposed new charter for Niagara County put to voter referendum in November 1972 should be the law of the County. The action as filed, presented and decided dealt wholly and solely with the proposed 1972 charter. Before decision or judgment, a new charter was put to referendum in

1974 which, by its express terms, superseded the proposed 1972 charter. On the basis of a District Court judgment declaring the 1972 charter to be the law of the County and directing State and County officials to implement and to proceed in accordance with the 1972 charter, those officials proceeded to regard and to implement the 1974 charter as the law of the County.

Did the case become moot as a consequence of the destruction of the subject matter of the action—the 1972 charter—by the intervening purported adoption and implementation of a superseding charter in 1974?

5. The District Court initially declared the 1972 charter to be in full force and effect as the law of the County, refusing—on the grounds of lack of jurisdiction—to have its judgment apply to declare the superseding 1974 charter as the law of the County. That judgment was vacated by this Court. On remand, the District Court amended its initial judgment, declaring the 1974 charter to be the law of the County. No proceedings or hearings relating to the 1974 charter have been had or permitted.

Did the District Court exceed its jurisdiction in amending its judgment to apply to the 1974 charter?

6. Is this action barred by *res judicata* by reason of the District Court's dismissal on the merits of a prior action raising the same issues, seeking the same relief, and brought by the County of Niagara acting on behalf of its citizens?

7. Did the District Court have authority under 28 U.S.C. § 2283 to enjoin the prosecution of a preexisting New York State Court action attacking, on procedural and other grounds, the attempted implementation of the 1974 charter?

Statement of Case

In November, 1972, a proposed charter establishing a new county government for the County of Niagara in the State of New York was put to referendum, as required by the New York State Constitution and the Municipal Home Rule Law *(supra,* pp. 3-5). The proposed charter would effect major changes in the form and nature of county government, creating the positions of County Executive and Comptroller, and granting to the proposed new county government general governmental powers. The proposed charter would provide the new county government with the authority to perform substantial governmental functions, including the power to establish a tax rate, to adopt laws and procedures relating to equalization of assessments, to issue bonds, to maintain county property and roads, and to administer health and public welfare services. Under the proposed charter the cities within the County would retain substantially greater governmental autonomy than the towns would enjoy (A. 19-32).

Article IX § 1(h)(1) of the Constitution of the State of New York and § 33(7) of the Municipal Home Rule Law of New York provide that the adoption, amendment or repeal of a county charter must be approved on referendum by a majority of those voting in areas outside of the cities in the county taken as a unit and by a majority of those voting in the cities within the county taken as a unit. There are eleven towns and three cities in the County of Niagara. The proposed charter failed to obtain a majority of the votes cast of the towns: 10,665 voting for and 11,594 against. In the cities, the vote was: 18,220 for and 14,914 against (A. 12, 134).

Since the proposed charter did not obtain the required affirmative votes, New York State officials refused to file the proposed new charter as a duly enacted Local Law permitting the charter to become effective.

In December, 1972, the County of Niagara (representing the citizens and voters of the County) commenced an action in the United States District Court for the Western District of New York against the State of New York, seeking a declaration that the governing New York constitutional and statutory provisions are violative of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution *(County of Niagara v. State of New York,* Civ. 1972-656; (A. 172-7).) On April 3, 1973, the District Court filed its decision that the action should be dismissed on the merits (A. 178-182). The Order of dismissal was entered April 3, 1973. No appeal was taken. The plaintiff-appellees here made no effort to intervene in that case for purposes of prosecuting an appeal, or otherwise.

Nevertheless, on May 4, 1973, plaintiff-appellees commenced this action seeking the same relief as that denied by the District Court in *County of Niagara, supra,* on the same grounds as those dismissed on the merits in that action (A. 7-19). Application was made and granted, for the convening of a three-judge District Court pursuant to 28 U.S.C. §§ 2281 and 2284 (R. 10).

No hearings were held or evidence adduced concerning the issues raised in the complaint. Instead, on cross-motions for summary judgment, the Court granted judgment to plaintiff-appellees, holding, contrary to its decision in *County of Niagara v. New York, supra,* that the New York State constitutional and statutory provisions governing the adoption of new county charters violate the Equal Protection Clause of the Fourteenth Amendment (A. 130-44). On January 9, 1975, a judgment was entered declaring those provisions to be unconstitutional and ordering the defendants to accept the charter for filing, and to implement it, on the ground that the charter had received a majority of the total number of votes cast in the 1972 referendum (A. 145-7). The Court noted

in its decision: "The precise issue here presented appears to be one of first impression" (A. 139).

Prior to the handing down of this decision, a new and different charter was put to referendum in November, 1974 (A. 70-127). This charter also failed to obtain the votes required by the New York State Constitution and the Municipal Home Rule Law but obtained a majority of the total votes cast (A. 128-9). Prior to the entry of judgment on the basis of the November 22, 1974 decision, a request was made to have that judgment apply to validate and to implement the 1974 charter rather than the 1972 charter which was the subject of the action. That request was denied by the District Court on the ground that since there had been no consideration of the charter put to referendum in 1974, or the circumstances of that referendum, and since the case which the Court had before it dealt wholly and solely with the charter put to referendum in 1972, the Court did not have jurisdiction to make its judgment apply to the charter put to referendum in 1974. Based on this refusal, the judgment entered on January 9, 1975 specifically declared that the charter purportedly adopted in 1972 was the governing law of the County of Niagara and specifically directed the State and County officials to implement that charter (A. 146-7).

On March 5, 1975, appellants were granted permission to intervene in order to prosecute an appeal to this Court (R. 24). The appeal was filed on March 6, 1975 (A. 148).

After the perfection of the appeal (Docket No. 74-1390), it was discovered that, with the concurrence of the plaintiff-appellees, the State and County governmental respondents were not implementing the 1972 charter, but in fact were proceeding to attempt to implement and to enforce, as the governing law of the county, the 1974 charter (R. 36, 38).

As a consequence of this intervening conduct on the part of the initial parties to the proceeding, appellants moved the District Court to vacate the judgment of January 1975 on the ground that the initial parties to the proceeding had destroyed the subject matter of the action and had effectively made the case moot. The Niagara County appellees conceded to the District Court as well as to this Court that the case had indeed become moot (R. 37, 41; Niagara County Appellees' May, 1975 Reply Brief to Jurisdictional Statement, p. 4). The District Court nevertheless refused to vacate the judgment on the ground that the reasons underlying the application were not "within the purview of Federal Rules of Civil Procedure Rule 60" (R. 40). Thereafter, this Court requested the parties to file briefs on the issue of mootness, and that was done.

On June 27, 1975, appellants commenced a proceeding in the New York State Supreme Court challenging the implementation of the 1974 charter (R. Ex-1). That proceeding was dismissed on the basis of the District Court's November 22, 1974 decision, without a hearing (R. Exs. 4, 5). An appeal was filed with the New York State Supreme Court, Appellate Division, Fourth Judicial Department.

On October 6, 1975, this Court entered an order and judgment vacating the January 1975 judgment and remanding the cause to the District Court ". . .for reconsideration in light of the provisions of the new charter adopted by Niagara County in 1974" (A. 161).

No hearings were had in connection with the remand to the District Court. Instead, counsel for the parties were summoned for oral consideration of the matter (A. 5, October 8, 1975). In recognition of the Court's lack of jurisdiction to effect a *nunc pro tunc* revision of the January 1975 judgment to apply to the proposed 1974 charter, the plaintiff-appellees moved to amend their complaint for the express purpose of

raising the issue of the validity of the 1974 charter and having hearings held with respect to the circumstances surrounding the November 1974 referendum and the proposed validation of the purported 1974 charter (A. 162, R. 46). The District Court denied that motion for amendment of the complaint, ruled that the case had not become moot, enjoined the prosecution of appellants' state court action, and amended its January 1975 judgment in order to make that judgment applicable to the 1974 charter (A. 163-7). This appeal followed on December 18, 1975 (A. 170-1).

Summary of Argument

The issue is state sovereignty

The fundamental constitutional issue presented is whether the states of the union have the absolute sovereign right to determine, without federal interference, what subordinate governmental subdivisions and instrumentalities they will employ to assist in the carrying out of state governmental functions, and to prescribe the means by which those determinations will be made.

Appellants make the following points:

—that subject only to the mandate of Article IV, Section 4, of the United States Constitution that each state shall have ". . .a Republican Form of Government. . .", each state has the absolute right and power to determine the form and structure of its subordinate governmental subdivisions and instrumentalities, and the concomitant discretion to prescribe the means by which such determinations shall be made;

—that there is, accordingly, no constitutional mandate requiring any state to permit direct voter participation by referendum in the determination of the form or structure of the state's subordinate governmental subdivisions;

—that in the exercise of its exclusive sovereign power and discretion, New York State may, in accordance with a constitution approved by its citizenry and implementing statutes enacted by its representative legislature, require that no changes in the form or structure of county government become effective without the complementary dual majority approval of voters residing in the cities of the county and of the voters residing in the towns of the county.

This case involves no claim that the questioned constitutional and statutory provisions in any way deprive any of the citizens of New York of a "Republican Form of Government". No claim is made that there is any denial of equal protection with respect to the election of governmental representatives. No claim can be made that the residents within the various counties of New York have a constitutional right—under the Fourteenth Amendment or otherwise—to direct participation by voter referendum in the determination of the form or structure of county or other subordinate governmental subdivisions of the State.

This is *not* a one-person, one-vote case. That doctrine has no application to the exercise by the State of its sovereign right to determine, in such manner as its constitution and general laws provide, the means or procedures by which decisions shall be made concerning changes in the form and structure of county government, and consequent changes in the rights and interrelationships of cities, towns, villages or other lesser subdivisions within the county.

If it be assumed that the one-person, one-vote doctrine has application, the complementary dual majority requirement is not, as treated by the court below, a *per se* violation. Plaintiff-appellees have failed to sustain the burden of establishing by competent proof that the constitutional and statutory provisions attacked result in "invidious discrimination", or that they are not warranted by legitimate internal State govern-

mental interests. On the contrary, those provisions reflect the voice of the entire State electorate that "close-to-the-people" state subdivisions must have protection from the possible tyranny of urban voters with different interests and concerns. Indeed, the provisions act as well to protect city municipalities from being overridden by non-urban majorities.

Improper relief and lack of jurisdiction

The initial judgment of the court below declared the 1972 charter to be the law of Niagara County on the ground that a majority of all voters within the County voted for its approval, and despite the fact that the complementary dual majority votes required by the law of the state pursuant to which the referendum was held were not obtained. The voters having participated in the referendum on the premise that the prescribed complementary dual majority votes would be required for adoption, the District Court improperly "changed the rules after the game" and preempted the voter's right to exercise his franchise with foreknowledge that a simple majority could result in adoption.

There was no showing that the charter would have obtained overall majority approval if the referendum had been held on that basis. No such assumption can be entertained. If relief was warranted, the Court should have required that a new referendum be held on the basis of the new rules.

In addition, in amending its initial judgment to make it applicable to the 1974 proposed charter rather than the 1972 proposed charter, the District Court committed the same error, and acted beyond its jurisdiction. The 1974 charter and the circumstances of its purported adoption were not part of this case. No proceedings or hearings were had or permitted concerning those matters. The Court had no jurisdiction to order its adoption or implementation.

Res judicata

The precise issues raised by the complaint were raised in an earlier action brought to obtain a declaration of unconstitutionality and to enforce the 1972 charter as the law of Niagara County: *County of Niagara v. State of New York,* Civ. 1972-656 (A. 172-7). The District Court there held that the one-person, one-vote concept had no application, that no substantial federal question was raised, and that the complaint should be dismissed (A. 178-82). That judgment is *res judicata.*

Mootness

The subject matter of this action was the proposed 1972 charter. The appellees have acted jointly to destroy that subject matter by purporting to adopt, and in fact implementing, a superseding and different charter in 1974. Appellees have thus rendered the proceeding moot.

Enjoining prosecution of state court action

The District Court exceeded its jurisdiction in enjoining appellants from proceeding with a state court action challenging—on procedural and other grounds—the certification and implementation of the 1974 charter. That action was contrary to 28 U.S.C. §2283, *Younger v. Harris,* 401 U.S. 37 (1971), and other decisions of this Court.

I. Subject only to the constitutional mandate that a Republican Form of Government be provided, each state has the exclusive sovereign right to establish—without federal interference—the structure of its subordinate governmental subdivisions, and to prescribe the means and procedures by which those structures will be determined.

This is a case of first impression. It involves a proposed extraordinary enlargement and extension of the one-person, one-vote rule of *Baker v. Carr,* 369 U.S. 186 (1962).

The question raised is whether the Equal Protection Clause of the Fourteenth Amendment requires a state to afford its citizens the right to determine, by election process compatible with the one-person, one-vote concept, the form or structure of subordinate governmental instrumentalities within the state.

A. There is no constitutional right of voter participation.

Consideration of the issues presented on this appeal must begin with the proposition—long acknowledged by this Court—that the states have the exclusive right and authority, without interference from the federal government or judiciary, to establish, modify or abolish local government units and structures. As the Court unanimously observed in *Gomillion v. Lightfoot,* 364 U.S. 339, at 343 (1960), the creation by the state of its municipalities is "clearly a political act".

In holding that the selection of members of a county school board did not necessitate an election, and that accordingly the principle of one-person, one-vote had no relevancy, the Court began its consideration in *Sailors v. Board of Education,* 387 U.S. 105 (1967), with the observation that:

We start with what we said in *Reynolds v. Sims, supra,* at 575;

'Political subdivisions of States—counties, cities, or whatever—never were and never have been considered as sovereign entities. Rather, they have been traditionally regarded as subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental functions. As stated by the Court in *Hunter v. City of Pittsburgh,* 207 U.S. 161, 178, these governmental units are "created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them," and *the "number, nature and duration of the powers conferred upon [them] . . . and the territory over which they shall be exercised rests in the absolute discretion of the State."* '

"We find no constitutional reason why state or local officers of the nonlegislative character involved here may not be chosen by the governor, by the legislature, or by some other appointive means rather than by election. Our cases have, in the main, dealt with elections for United States Senator or Congressman (*Gray v. Sanders, supra; Wesberry v. Sanders,* 376 U.S. 1) or for state officers (*Gray v. Sanders, supra*) or for state legislators. *Reynolds v. Sims, supra; WMCA, Inc. v. Lomenzo,* 377 U.S. 633; *Davis v. Mann,* 377 U.S. 678; *Roman v. Sincock,* 377 U.S. 695; *Lucas v. Colorado Gen. Assembly,* 377 U.S. 713; *Marshall v. Hare,* 378 U.S. 561.

"They were all cases where elections had been provided and cast no light on when a State must provide for the election of local officials." (387 U.S. at 107-8 Emphasis supplied).

The Court thus reaffirmed the essential principle stated in *Hunter v. City of Pittsburgh,* 207 U.S. 161 (1907), that the "number, nature and duration of the powers conferred upon" municipalities "rests in the absolute discretion of the state".

The language of *Hunter, supra,* further reflects what must be the touchstone for review of the findings of unconstitutionality in the case at bar:

"Municipal corporations are political subdivisions of the State, created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them. For the purpose of executing these powers properly and efficiently they usually are given the power to acquire, hold, and manage personal and real property. The number, nature and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the State. Neither their charters, nor any law conferring governmental powers, or vesting in them property to be used for governmental purposes, or authorizing them to hold or manage such property, or exempting them from taxation upon it, constitutes a contract with the State within the meaning of the Federal Constitution. The State, therefore, at its pleasure may modify or withdraw all such powers, may take without compensation such property, hold it itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. *All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all these respects the State is supreme, and its legislative body, conforming its action to the state constitution, may do as it will, unrestrained by any provision of the Constitution of the United States.*" 207 U.S. 161, at 178-9 (Emphasis supplied).

It is thus clear that the state would have the right, for example, to vest in its governor, or in some designated official—elected or appointed—the authority to determine and to prescribe the form and structure of municipal governments, and no citizen could demand as a matter of constitutional right that those determinations be made by vote of local residents. The matter is clearly political, and subject to political determination.

While the Court has repeatedly held since *Baker v. Carr, supra,* that equal suffrage is a constitutional necessity with

respect to the election of government representatives, the Court has never held that the authority of the state to create and to determine the appropriate form and structure of its subordinate governmental instrumentalities is limited or proscribed by any requirement of voter approval.

B. The teaching of *Gomillion v. Lightfoot*, 364 U.S. 339 (1960) and other decisions is that this exercise by New York of its sovereign political power is insulated from federal judicial review.

The court below erroneously reasoned that although the state was not constitutionally obliged to permit voter participation in the matter of prescribing the form of its subordinate units of government, if it in fact allowed any such participation, it must do so only on a one-person, one-vote basis. Principal reliance was placed on the following language from *Gomillion v. Lightfoot, supra:*

> "When a State exercises power wholly within the domain of state interests, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right. This principal has had many applications. It has long been recognized in cases which have prohibited a State from exploiting a power acknowledged to be absolute in an isolated context to justify the imposition of an 'unconstitutional condition.' What the Court has said in those cases is equally applicable here, *viz.*, that 'Acts generally lawful may become unlawful when done to accomplish an unlawful end, *United States v. Reading Co.*, 226 U.S. 324, 357, and a constitutional power cannot be used by way of condition to attain an unconstitutional result' " (364 U.S. at 347-8).

The court below acknowledged that in the creation and structuring of subordinate governmental instrumentalities the state is exercising sovereign power "wholly within the domain of state interest" which "*is insulated from federal judicial*

review." But the conclusion is then assumed that there is "a federally protected right" which is being circumvented by state power, and that therefore the insulation fails. The unanswered but dispositive question is: What *is* the "federally protected right" which the state constitution and statute offend? It is not the right to participate on an equal basis in the election of representatives, for there is and can be no claim of violation of that right. It cannot be the right to participate by direct local vote in the determination of the nature of powers to be exercised by local governments, for the teaching of *Hunter v. City of Pittsburgh, supra, Reynolds v. Sims,* 377 U.S. 533 (1964), and *Sailors v. Board of Education, supra* is that no such constitutional right exists.

In *Gomillion v. Lightfoot, supra,* the Court was dealing with the exercise of state power to effect a blatant discriminatory gerrymandering designed to deprive black voters of their franchise to elect government representatives. The federally protected right in *Gomillion* is the undisputed constitutional right of all voters to participate on an equal basis in the selection of elected representatives. That issue—that "federally protected right"—is not involved in this case. Since the appellees do *not have* a federally protected right to participate by direct vote in the structuring of the state's local governmental units, the challenged state laws cannot be held to violate a non-existent constitutional interest. The insulation from federal judicial review which *Gomillion* acknowledges therefor precludes such review.

Moreover, no "unlawful end" is being accomplished by the New York Constitution or its Home Rule Law. The end here is the establishment or modification of subordinate local government—a legal end as to the accomplishment of which the state concededly has full and exclusive power.

Nor is any constitutional power being "used by way of condition to attain an unconstitutional result". The result here is

not unconstitutional. The state has the right to create its own subordinate government units on such terms as it may select provided only that the citizens of the state are afforded a "Republican Form of Government" within the meaning of Article IV of the Constitution. *With or without the proposed new charter, Niagara County is and would be governed by a "Republican Form of Government" through a legislative body selected in accordance with the one-person, one-vote mandate.*

Gomillion v. Lightfoot, supra, does not stand as authority for the District Court's decision in this case. Indeed, *Gomillion* itself demands a holding that New York is exercising sovereign power wholly within the domain of its own state interest which is insulated by the Constitution from federal judicial review.

Nor is the determination below either mandated or supported by *Gray v. Sanders,* 372 U.S. 368 (1962) or by *Avery v. Midland County,* 390 U.S. 474 (1967). In *Gray,* the Court was again reviewing the process of election of government representatives, holding that since Georgia regulated the conduct of party primaries through exercise of state powers, its action with respect to that part of the representative election process was state action, thus affording standing to sue to any citizen whose right to vote for such elected representatives was impaired by that state action. The protected right involved in *Gray* as well as in *Avery* is the right of the citizen to vote on an equal basis with all other voters for elected representatives, and not to have state action debase or dilute that specific constitutionally protected right. The charter referendum procedures in New York in no way impinge upon that existing, insured right.

C. The establishment and structuring of subordinate state governmental subdivisions are internal, political matters constitutionally reserved to the exclusive control of the states.

The issue may be sharpened by considering a simple hypothetical. What view would the Court take of a Congressional enactment *requiring* each state to put to direct referendum vote all matters relating to the establishment or modification of the form or structure of subordinate state governmental subdivisions such as counties, parishes, regions, towns, villages, cities or the like? We venture to state that but little time would be required to pronounce such a statute to be an impermissible federal invasion of the states' sovereign power to prescribe its own internal governmental structure by such means as it sees fit. As a matter of logic as well as constitutional necessity, would not the result be the same if the federal statute did not contain such a blanket requirement but presumed to provide that *if* a state elected to permit any form of limited or other than simple majority voter participation or control as to such matters, that it *must* fashion its procedures on a one-person, one-vote simple majority rule basis? In either case, the governing principle remains the same. Other than as expressly permitted by Article IV, Section 4, of the Constitution, neither the Congress nor the federal judiciary have the constitutional power to invade any state's retained right to construct its own internal system of government. And yet, that is precisely what the lower court judgment accomplishes.

The Tenth Amendment to the Constitution serves to emphasize what was and is implicit in the United States federal system and in its original, unamended Constitution:

> "Article X
>
> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

There was from the beginning great concern that the sovereign integrity of the individual states to govern themselves be honored and protected in the Constitution. Before ratification, James Madison wrote:

> "The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the state governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will, for the most part, be connected. The powers reserved to the several states will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the state. . . If the new constitution be examined with accuracy and candor, it will be found that the change which it proposes consists much less in the addition of new powers to the Union, than in the invigoration of its original powers." *(The Federalist,* 45 Madison: *Powers and Continuing Advantages of the States,* Edited by B. F. Wright, Belknap Press, pp. 328-9).[1]

There is no express authorization in the Constitution for federal control of the structuring of the state government. Even where the federal government is granted express power to exercise authority to the displacement of state sovereignty, such as the regulation of interstate commerce under the express authority of the Commerce Clause, this Court has but recently evidenced a welcome sensitivity to the necessity of balancing the competing interests of our federal system.

In *The National League of Cities v. Usery,* 44 U.S.L.W. 4974 (U.S. June 24, 1976), this Court held that 1974 amendments to the Fair Labor Standards Act which would extend the Act's

[1] See *Cohens v.. Virginia,* 19 U.S. 264 at 418 (1821) for an expression of the interpretational value of *The Federalist.*

minimum wage and maximum hour provisions to virtually all employees of states and their political subdivisions, were not within the authority granted Congress by the Commerce Clause. Speaking for the Court in overruling *Maryland v. Wirtz*, 392 U.S. 183 (1968), Mr. Justice Rehnquist noted:

> "But we have reaffirmed today that the States as States stand on a quite different footing than an individual or a corporation when challenging the exercise of Congress' power to regulate commerce. We think the dicta from *United States v. California*, simply wrong. Congress may not exercise that power so as to force directly upon the States its choices as to how essential decisions regarding the conduct of integral governmental functions are to be made. We agree that such assertions of the power, if unchecked, would indeed, as Mr. Justice Douglas cautioned in his dissent in *Wirtz*, allow 'the National Government [to] devour the essentials of state sovereignty.' 392 U.S., at 205, and would therefore transgress the bounds of the authority granted Congress under the Commerce Clause." 44 U.S.L.W. at 4980.

There is, we submit, a pressing need for judicial self-restraint and constitutional conservatism in this case. There is no contest here between the principle of state sovereignty and the rights of the citizen to Equal Protection under the Fourteenth Amendment, for the simple reason that no such individual rights are impinged upon by New York's Constitution or legislation. The contest is whether this Court will permit the federal judiciary to extend the one-person, one-vote concept beyond the bounds of its reason for existence and thus permit that salutory concept to "...devour the essentials of state sovereignty, though that sovereignty is attested by the Tenth Amendment". *Maryland v. Wirtz, supra*, at 205 (Justice Douglas' dissent). Few things could be more essential to state sovereignty than the state's exclusive right—exercised by its citizens through its constitution and general legislation—to set up its own form of government and is own political subdivisions in its own way.

II. The New York Procedure Governing the Structure of its Subordinate Governmental Subdivisions Does Not, in Any Event, Offend the Equal Protection Clause.

There is and can be no claim that the laws under review either directly or indirectly deprive any citizen of voting equality with reference to the election of representatives, state or local. They deal not with representation, but with the means and procedures which the State has determined are most appropriate to effect changes in the form or structure of local governments. They reflect the judgment of the people of the State acting directly through the approval of the amendment in 1935 of the New York State Constitution to include Article IX §1 (h) (1), and indirectly through their elected representatives by enactment of §33(7) of the New York Municipal Home Rule Law.

The people of the State, in a general election held on November 5, 1935, voted to include the complementary majority vote requirements in the Constitution, with 62% in favor and 28% opposed—a margin of 2.6 to 1 in favor. The subject of local home rule, and the protection of the instrumentalities of "grass roots" government from encroachment or destruction by larger subdivisions, has been studied and debated within the State on a virtually continuous basis. Recurring efforts to remove the protections afforded by the complementary majority requirements have failed to obtain voter approval (See *Revised Record, New York State Constitutional Convention 1938*, Vol. IV, pp. 2956-2969; New York State Legislative Document No. 58, 1959, *Report of the Temporary Commission on the Revision and Simplification of the Constitution;* Vol. 13, Temporary State Commission on the Constitutional Conventions, 1967).

It is not a matter of semantics to urge upon this Court the proposition that the determination of the form and structure

of subordinate state government instrumentalities is a political matter over which the people of the state as a whole, by exercise of their political rights, have exclusive control.

The New York State procedure under review was designed and operates to require something more than a mere majority approval to effect a change in the form of county government and consequent changes in the inter-relationships between county authority and city, town and village authority. *Gordon v. Lance,* 403 U.S. 1 (1971). The procedure recognizes that the needs of localities are often best served by the exercise of governmental power by smaller political units which are closer to the people, more intimately familiar with their local problems and needs, and more directly responsive to the people. *Dusch v. Davis,* 387 U.S. 112 (1966). The procedure was designed to exercise the state's sovereign right in such a fashion that neither the city dwellers' rights with respect to city government, nor the town dwellers' rights with respect to town government, could be overridden without mutual consent. *Salyer Land Company v. Tulare Lake Basin Water Storage District,* 410 U.S. 719 (1973).

This Court has not stripped the states of all governmental discretion and flexibility even in situations involving the election of representatives. In *Salyer* it was held that the "popular election requirements enunciated by *Reynolds*" were inapplicable to general elections of a Water Storage District, and that California could constitutionally limit the vote to landowners as distinguished from nonlandowners and lessees. Of course, the challenged New York constitutional and statutory provisions do not go so far. No voter qualified to vote in general elections is prohibited from voting. The complementary majority provisions provide a system of "checks and balances" while granting voter participation in matters where no federal constitutional right to vote exists.

The one-person, one-vote principle is surely not some omnipresent, all encompassing, all governing presence hovering over and intruding into all state and local functions and activities. *Cipriano v. City of Houma,* 395 U.S. 701 (1968) and *Kramer v. Union Free School District No. 15,* 395 U.S. 621 (1969), tell us that in particular circumstances, outright exclusions of qualified voters may be "necessary to promote a compelling state interest" (at 627). In *Wells v. Edwards,* 409 U.S. 1095 (1973), Louisiana constitutional provisions for the election of state Supreme Court justices from election districts established without regard to population, were upheld in the face of a one-person, one-vote attack. See *Fortson v. Morris,* 385 U.S. 231 (1966); *Newton v. Commissioners,* 100 U.S. 548 (1879).

In *Dusch v. Davis, supra,* the Court upheld an election plan for the selection of representatives which was in part based on candidate borough residency requirements, without regard to population, observing that the plan "seems to reflect a detente between urban and rural communities that may be important in resolving the complex problems of the modern megolopolis in relation to the city, the suburbia, and the rural countryside" (387 U.S. at 117).

The restraining and tempering views of the Court as expressed in *Sailors v. Board of Education, supra,* must not be lost in pursuit of a simplistic and insensitive extension of a principle beyond the bounds of its *raison d'etre*:

> "Viable local governments may need innovations, numerous combinations of old and new devices, great flexibility in municipal arrangements to meet changing urban conditions. We see nothing in the Constitution to prevent experimentation." (387 U.S. at 111).

Approval of the decision below would result in an extension of the one-person, one-vote principle and the coincident extension of judicial control into political areas never

contemplated by the decisions spawning that principle. A holding of unconstitutionality must also strike down other similar statutory provisions which provide safeguards against coerced annexation of local units by their larger neighbors (See Section 33-a Municipal Home Rule Law of New York, McKinney's Consolidated Laws of New York, Vol. 35c, p. 26, Supplement).

In *Missouri v. Lewis,* 100 U.S. 22 (1879), this Court upheld state statutes which provided for appeals to the Missouri Supreme Court from judgments rendered in certain counties while prohibiting appeals from similar judgments rendered in other counties, in the face of claims of denial of equal protection under the Fourteenth Amendment:

> "Each State has the right to make political subdivisions of its territory for municipal purposes, and to regulate their local government. As respects the administration of justice, it may establish one system of courts for cities and another for rural districts, one system for one portion of its territory and another system for another portion. Convenience, if not necessity, often requires this to be done, and it would seriously interfere with the power of a State to regulate its internal affairs to deny to it this right. We think it is not denied or taken away by any thing in the Constitution of the United States, including the amendments thereto.
>
> "We might go still further, and say, with undoubted truth, that there is nothing in the Constitution to prevent any State from adopting any system of laws or judicature it sees fit for all or any part of its territory. If the State of New York, for example, should see fit to adopt the civil law and its method of procedure for New York City and the surrounding counties, and the common law and its method of procedure for the rest of the State, there is nothing in the Constitution of the United States to prevent its doing so. This would not, of itself, within the meaning of the Fourteenth Amendment, be a denial to any person of the equal protection of the laws." (100 U.S. at 30-31).

In *Luther v. Borden,* 48 U.S. 1 (1849), this Court refused to impose its judgment on the question of which of two competing constitutions had been properly adopted in Rhode Island, Chief Justice Taney expressing the Court's views:

> "Much of the argument on the part of the plaintiff turned upon political rights and political questions, upon which the court has been urged to express an opinion. We decline doing so. The high power has been conferred on this court of passing judgment upon the acts of the State sovereignties, and of the legislative and executive branches of the federal government, and of determining whether they are beyond the limits of power marked out for them respectively by the Constitution of the United States. This tribunal, therefore, should be the last to overstep the boundaries which limit its own jurisdiction. And while it should always be ready to meet any question confided to it by the Constitution, it is equally its duty not to pass beyond its appropriate sphere of action, and to take care not to involve itself in discussions which properly belong to other forums. No one, we believe, has ever doubted the proposition, that, according to the institutions of this country, the sovereignty in every State resides in the people of the State, and that they may alter and change their form of government at their own pleasure." (48 U.S. at 46-47).

In no case has this Court extended or indeed presaged the extension of *Baker v. Carr, supra,* to the process of the state's selection of the form and structure of its local municipal governments.

With but rare exceptions, previous cases in which this Court has invoked the one-person, one-vote rule have involved the election of governmental representatives. *Baker v. Carr, supra; Reynolds v. Sims, supra; Salyer Land Company v. Tulare Lake Basin Water Storage District, supra,* and cases reviewed therein. The exceptions have related to the approval of general obligation bonds, *Phoenix v. Kolodziejski,* 399 U.S. 204 (1969),

and to the approval of revenue bonds, *Cipriano v. City of Houma, supra.*

The constitutional mandate is not one-person, one-vote, but equal protection of the laws. The simple fact that a vote is involved in a state procedure relating to its internal government functions does not automatically call the one-person, one-vote concept into play. The question must be whether equal protection of the laws has been denied. The answer here is that there has been no showing of any such denial, despite the clear burden of proof on the plaintiff-appellees to establish the existence of "invidious discrimination" (See *Holshouser v. Scott,* 335 F. Supp. 928, 933 (M.D.N.C. 1971), *aff'd* 409 U.S. 807 (1972); *Stokes v. Fortson,* 234 F. Supp. 575, 577 (N.D. Ga. 1964); *Wright v. Rockefeller,* 376 U.S. 52 (1964); *White v. Regester,* 412 U.S. 755 (1973); *United Jewish Organization of Williamsburgh v. Wilson,* 510 F.2d 512 (2d Cir. 1974).

In *Wells v. Edwards,* 347 F. Supp. 453, at 455 (M.D. La. 1972), *aff'd* 409 U.S. 1095 (1973), the Court held that: "[T]he rationale behind the one-man, one-vote principle, which evolved out of efforts to preserve a truly representative form of government, is simply not relevant to the makeup of the judiciary." The rationale is even less relevant to the procedures by which the states determine to establish or modify their internal governmental structures or subdivisions.

The procedure adopted by the people of New York State recognizes that there are in fact important legal and factual differences between the form and nature of city government as selected by the voters resident within the city, and the form and nature of the town form of government as selected by the voters resident within the towns. There are important practical differences between the governmental needs of these two

differing types of residents. The wisdom of the people of the state as a whole was to give protection to each against encroachment and dilution of chosen local government powers by requiring that before any county government could be superimposed or modified, a majority of the voters in the towns approve, and a majority of the voters in the cities approve. This is a reasonable and responsible exercise of the state's sovereign political right to determine its own form of government.

Nor can it be claimed that the urban resident is disadvantaged by this procedure. The basic constitutional provisions were again adopted and approved by the voters of the state as a whole acting on referendum as recently as 1963 (Article IX, Section 1, added 1963, McKinney's Consolidated Laws of New York, Book 2, Constitution). The procedure is subject to change by the same political means by which it was initially adopted. There is a constitutionally appropriate means of political change. Since approximately 10.6 million people reside within the cities of the state, while approximately 7.5 million live in the towns, urban voters have the numerical potential to effect such change if desired (New York State Constitution, Article XIX, Vol. 2 McKinney's Consolidated Laws of New York p. 678).

Since 1965, new charters for county government have been proposed to the citizens of 14 counties. Three charters were adopted by obtaining the complementary dual majority votes required. Eight charters failed to obtain a majority vote in either the towns or in the cities of the county. One failed to obtain majority approval of the city voters; two (including Niagara County) failed to obtain majority approval of town voters. This experience demonstrates that the provisions in question do not operate to the advantage or disadvantage of any defined group of citizens.

The proposed Niagara County Charter involves major modifications in political approach. It would effect the realignment and transference of existing government functions and prerogatives among and from local government units to the proposed county government unit. The citizens residing in the towns within the county have a direct stake in their existing town governments and in the powers and authorities with which those governments operate. The same is true of city residents with respect to city governments. Accordingly, it is altogether proper to require the unit majority approval of these two classes of government instrumentalities to the superimposition of a new county government which would have very material effects on existing local control of local matters, and on the responsibility for and payment of various services. The complementary majority approval procedure is justifiable even if the one-person, one-vote concept were to have application to this kind of state political action.

Even in those circumstances where the one-person, one-vote concept has relevance, it has been recognized that something different or more than simple majority approval can properly be required. *Mahan v. Howell,* 410 U.S. 315 (1972); *Gaffney v. Cummings,* 412 U.S. 735 (1972).

What would the Court say here if the provisions under attack required not a dual majority but a 60% or 65% or 70% majority vote of the whole? Depending on the population mix of the particular county, either city or town residents might be heard to complain that a disproportionate weighting was being accorded to the numerically smaller group. The same cries of "veto power" and deprivation of equal suffrage as are made in this case would be heard. But, the Court would say, as it should here:

> "Certainly any departure from strict majority rule gives disproportionate power to the minority. But there is nothing in the language of the Constitution, our history, or our cases that requires that a majority always prevail on every issue. On the contrary, while we have recognized that state officials are normally chosen by a vote of the majority of the electorate, we have found no constitutional barrier to the selection of a Governor by a state legislature, after no candidate received a majority of the popular vote. *Fortson* v. *Morris,* 385 U. S. 231 (1966)." (*Gordon v. Lance,* 403 U.S. 1, at 6, upholding a 60% referendum approval of bonded indebtedness or increases in tax rates).

In sum, the challenged New York constitutional and statutory provisions do not result in a denial of equal protection of the laws.

III. The District Court Improperly Preempted the Role and Rights of the Electorate.

Essential to the integrity of any voting process is knowledge on the part of those qualified to vote as to the consequences and effect of the vote cast or not cast. Those involved and affected must "know the rules of the game" before the game is played.

The voters of Niagara County were not once, but twice, offered proposed new charters in referenda held on the basis that to become effective, the charter must obtain the complementary majority votes required by the State Constitution. Votes were cast or not cast in reliance on that premise. Prereferendum political efforts at persuasion or education were also based on the proposition that the charter could not become effective without the dual majority. The referendum was *not* conducted, and the voters did *not* act, on the premise that a simple majority of the total votes cast countywide would be sufficient to provide approval.

The District Court, however, changed the rules after the game was twice played and held that under new and different

rules, pursuant to which no voter had acted, the proposed charters had gained approval.

The relief granted by the District Court assumes an unproven and unprovable conclusion: that the results of the referenda would have been the same if the voters had known in advance that the rules were different than they thought, and that a simple majority would control. Equality of voting rights and the one-person, one-vote concept itself necessitate an exercise of the voting prerogative with advance knowledge of the consequences of the vote cast.

It was improvident and violative of voter rights for the District Court to order the charters to become effective. Even if the finding of unconstitutionality had merit, the equitable and proper relief would be to order or permit a new referendum based on the new rules. *Cipriano v. City of Houma, supra; Phoenix v. Kolodziejski, supra.*

IV. The Court Below Exceeded its Jurisdiction in Entering the December 1975 Declaratory Judgment that the 1974 Charter is in Full Force and Effect as the Form of Local Government for Niagara County.

We begin with the proposition that a court cannot act *sua sponte*, but must await the action of some person invoking its jurisdiction. In declaring the 1974 charter to be the instrument defining local government in Niagara County, the District Court was, in effect, invoking its own jurisdiction.

The validity of the 1974 charter was not placed in issue by the pleadings in this case. There were no hearings or proceedings with respect to the 1974 charter. Indeed, the District Court itself specifically refused to have its original January 1975 judgment apply to the 1974 charter for the very reason that that charter was not before the Court, not part of the case, and therefore beyond the jurisdiction of the Court.

Nor was the 1974 charter's validity "tried by express or implied consent of the parties" within the meaning of Section 15(b) of the Federal Rules of Civil Procedure. In fact, the District Court denied petitioners' motion to amend the complaint in this action in order to give the Court jurisdiction and to have hearings with respect to that charter (A. 156-60, 162. R. 46). Nevertheless, the Court below presumed to enter a judgment declaring that charter to be the law of the County of Niagara.

In attempting to justify this unusual judgment, the District Court stated that:

> "The 1974 charter is already part of the record in this case and the United States Supreme Court has specifically directed us to consider it."

We have the following observations as to this proffered justification:

1. The record in this case, with respect to the issues presented by the petition, became complete upon entry of the District Court's judgment determining those issues on January 19, 1975. The purported 1974 charter was not part of that record.

2. The District Court itself initially refused to consider the 1974 charter on the very ground that it was *not* a part of the case and therefore beyond its jurisdiction.

3. The initial appeal of the intervening defendants to this Court was from the January 1975 judgment, which related wholly and solely to the 1972 charter.

4. The sole relevance of the 1974 charter to this case and to the appeal is with respect to whether the purported adoption and the actual implementation of that charter rendered this case moot.

5. At various times during proceedings relating to the District Court's January 1975 judgment, all parties to the ac-

tion conceded that the District Court did *not* have jurisdiction over the 1974 charter and could not render any judgment with respect to it.

6. The direction of this Court to the District Court on October 6, 1975 was to *reconsider the case before it* in light of a subsequent legislative development as that legislative development might make the case before the Court moot. It was not a direction to the Court to consider the *validity* of the subsequent legislative development, or to enter a declaratory judgment concerning the enforceability or governing effect of that legislative development.

The District Court exceeded its jurisdiction in attempting to render a judgment declaratory of the validity or enforceability of the 1974 charter.

V. The Action is Barred by *Res Judicata.*

The April 3, 1973 decision of the District Court for the Western District of New York in *County of Niagara v. State of New York,* Civil 1972-656 (A. 178-82), was pleaded as *res judicata,* barring prosecution of the instant action.

In refusing to dismiss the action on that ground, the court below delineated the required conditions for the defense to be available:

> "Under settled law three factors must be present to support a defense of res judicata or collateral estoppel: (1) there must have been a 'final judgment on the merits' in the prior action; (2) identical issues sought to be raised in the second action must have been decided in the prior action; and (3) the party against whom the defense is asserted must have been a party to or in privity with a party to the prior action. *Kreager v. General Electric Company,* 497 F.2d 468, 471-72 (2 Cir. 1974), quoting from *Zdanok v. Glidden Company, Durkee Famous Foods Division,* 327 F.2d 944, 955 (2 Cir.), *cert. denied,* 377 U.S. 934 (1964)."

The District Court found that the present plaintiff-appellees were not in privity with the County of Niagara in the prior action and thus declined to apply the bar of *res judicata.*

This finding was manifestly erroneous. The very opening sentence of the District Court's decision in *County of Niagara v. State of New York, supra,* is:

> "Plaintiff, a political subdivision of the State of New York, has filed this action on behalf of its voters seeking a declaratory judgment and injunctive relief against the enforcement by defendant of Article 9(h)(1) of the New York State Constitution and Section 33(7) of the Municipal Home Rule Law of the State of New York." (A. 178).

The instant action was commenced and prosecuted by plaintiff-appellees as a class action on behalf of the voters of Niagara County (A. 9-10, 47-52), the same allegedly aggrieved persons on whose behalf the *County of Niagara v. State of New York, supra,* action was brought. In that action:

—The County of Niagara took the same position and sought the same relief as plaintiff-appellees do in the case at bar;

—Precisely the same constitutional and factual issues raised in this case were raised and determined.

The plaintiff-appellees here were aware of the pendency of the Niagara County suit but made no effort to gain intervention on the ground that their rights were not being protected by the County. The present action was filed only after the judgment in *County of Niagara v. State of New York, supra,* had become final.

This case is, and should be, barred by *res judicata.*

VI. The Case Became Moot Before the Court Below Entered its Judgment of December 1975.

The specific and sole purpose of this action was to obtain an order directing the Niagara County and State respondents to file and to certify Niagara County 1972 Local Law No. 1, providing for the adoption and implementation of a new charter form of government for the County. The subject matter of the action was the validity of the proposed 1972 charter as put to referendum in November 1972. The judgment questioned on appeal declared the 1972 charter to be "in full force and effect as the instrument defining the form of local government for Niagara County" (A. 146-7).

Prior to the entry of the District Court's January 9, 1975 judgment, respondents requested that the Court make the judgment applicable to the 1974 charter rather than to the 1972 charter, in order to provide that the 1974 charter would be the "instrument defining the form of local government for Niagara County". Since the case as filed, processed and decided dealt solely with the proposed 1972 charter and the 1972 referendum, and neither the parties nor the Court had addressed themselves to the proposed 1974 charter, and since there was at that time no case or controversy concerning the proposed 1974 charter, the District Court properly refused the application.

Despite these facts, appellees proceeded to file, certify and proceed in accordance with the purported 1974 charter immediately after appellants obtained an order to show cause on February 27, 1975 to gain intervention to prosecute an appeal to this Court from the District Court's January 9, 1975 judgment. Long prior to the District Court's December 1975 judgment purporting to amend the January 9, 1975 judgment to declare the 1974 charter as the law of the County, appellees had destroyed and abandoned the 1972 charter.

As conceded by the Niagara County appellees in a brief filed with this Court in May 1975:

> "[Point] III. The question before the Court in regard to the 1972 Charter is now moot." (Appellees Graf and Comerford May 1975 "Reply to Jurisdictional Statement", Docket No. 74-1390, p. 4).

The District Court's *ex post facto* attempt to change the subject matter of the action notwithstanding, the case has become moot.

A. The Constitution forbids judicial action except where a live controversy exists.

Article III, Section 2, of the Constitution requires as a condition to federal jurisdiction the existence of a live case or controversy. *Liner v. Jafco, Inc.*, 375 U.S. 301 (1964).

This Court's appropriate sensitivity to this jurisdictional prerequisite is clearly reflected in a number of recent mootness decisions. For example, in *Rescue Army v. Municipal Court*, 331 U.S. 549 (1947), the Court declined to exercise jurisdiction and dismissed the appeal, stating at page 570:

> "If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable. "*Spector Motor Service v. McLaughlin*, 323 U.S. 101, 105. It has long been the Court's 'considered practice not to decide abstract, hypothetical or contingent questions . . . or to decide any constitutional question in advance of the necessity for its decision . . . or to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied . . . or to decide any constitutional question except with reference to the particular facts to which it is to be applied . . .' " *Alabama State Federation of Labor v. McAdory*, 325 U.S. 450, 461. 'It is not the habit of the Court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case.' *Burton v. United States*, 196 U.S. 283, 295."

In *Roe v. Wade*, 410 U.S. 113, at 125 (1973), the Court said:

> "The usual rule in federal cases is that an actual controversy must exist at stages of appellate or certiorari review, and not simply at the date the action is initiated."

See also: *Golden v. Zwicker*, 394 U.S. 103 (1969); *Doremus v. Board of Education*, 342 U.S. 429 (1952); *Oil Workers Union v. Missouri*, 361 U.S. 363 (1960).

Any rights plaintiff-appellees had with respect to the implementation of the 1972 charter have now passed, since that charter has, with their concurrence, been extinguished and is not being implemented. There is no longer any live controversy in this proceeding.

B. This case does not fall within any of the recognized exceptions to the mootness doctrine.

There appear to be three principal exceptions to application of the mootness doctrine. None of these exceptions has application here.

1. The Court has refused to dismiss for mootness where the question involved is "capable of repetition, yet evading review". See *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498 (1911).

The basic rationale for this exception appears to be that review should not be foreclosed by the fact that the time element involved in the questioned activity is so short that the activity under review is necessarily completed before the judicial procedure can be completed. This exception has no relevance to the instant case since the mooting events are not inherent in the situation (such as in cases relating to voting in a specific election, pregnancy and so on) but in fact are intervening voluntary actions by respondents. The constitutionality of the New York constitutional and statutory provisions are cable of being tested in a properly brought

proceeding, involving an actual and live controversy, without mooting events occurring because of any inherent time limitation. The following cases indicate the type of situation in which this exception has application and indicate that it has no relevance to this proceeding. *Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115 (1975); *Storer v. Brown*, 415 U.S. 724 (1974); *Rosario v. Rockefeller*, 410 U.S. 755 (1973); *Roe v. Wade*, 410 U.S. 113 (1973); *Dunn v. Blumstein*, 405 U.S. 330 (1972); *Moore v. Ogilvie*, 394 U.S. 814 (1969).

2. The Court has refused to dismiss for mootness where there are collateral consequences from the questioned activity. In cases such as *Mancusi v. Stubbs*, 408 U.S. 204 (1972), *Sibron v. New York*, 392 U.S. 40 (1968), and *Carasas v. LaVallee*, 391 U.S. 234 (1968), the Court held that even though the specific issue in the case had become moot, there were continuing consequences to the litigants which demanded review and resolution of the issues presented. Essentially, these cases involve circumstances where criminal sentences have been served but the collateral consequences flowing from the convictions give the parties a sufficient continuing personal stake in the matter to allow the Court to make a negative mootness determination. There are, of course, no continuing collateral consequences of the this nature stemming from the purported adoption of the 1972 charter or its abandonment by the respondents. In fact, respondents themselves urge that the 1972 charter has been repudiated and superseded by the 1974 referendum and charter. The result is that the 1972 charter and referendum have passed from the scene, leaving no rights which now press for adjudication. What is now at issue is whether the purported 1974 charter has been properly adopted and effectuated—an issue which is before the New York Courts.

3. The Court has on occasion declined to dismiss for mootness where the defendant voluntarily discontinues the

questioned activities. The Court has refused to reach a finding of mootness where the defendants have discontinued the questioned action, on the ground that there could be no assurance that the questioned activity would not be resumed once the judicial process had been terminated by the finding of mootness. This was the rationale for the exception when it was first applied in *United States v. W. T. Grant Company*, 345 U.S. 629 (1953). The same rationale was employed in the later decisions of *Mancusi v. Stubbs, supra; U.S. v. Concentrated Phosphate Export Association*, 393 U.S. 199 (1968); and *Gray v. Sanders*, 372 U.S. 368 (1963).

In the case at bar, the respondents have taken the position that the proposed 1972 charter has been completely superseded, extinguished and replaced by the 1974 charter. Respondents are not proceeding in any fashion to implement or to attempt to implement the 1972 charter. Respondents advise the Court that no such effort will be made. In addition, the appellants who assert mootness have absolutely no ability and no intention to attempt to engage in the questioned activity raised in the proceeding as initially filed, that is, the implementation of the 1972 charter. Accordingly, this exception has no application in this case.

C. Practical considerations support a determination of mootness.

The issues involved in any consideration of the constitutionality of Article IX of the New York State Constitution or of Section 33(7) of the Municipal Home Rule Law of New York are of far-reaching importance. At the date of this submission, 105 towns and villages in the State of New York had adopted formal resolutions of support for the position being taken by the intervening appellants in this action.

The present proceeding comes to the Court with an extraordinarily spare record. No testimony or evidence was ad-

duced to establish the practical and governmental justifications for the New York State provisions. On the contrary, the judgment below is predicated on cross-motions for summary judgment. Adjudications of this magnitude should not be made in a factual vacuum. If it is held that the one-person, one-vote doctrine has application, the issues and the courts deserve substantially more in the way of a record with respect to a matter of such significance.

As the Court stated in *Socialist Labor Party v. Gilligan*, 406 U.S. 583 (1972), at page 588:

> "This Court has recognized in the past that even when jurisdiction exists it should not be exercised unless the case 'tenders the underlying constitutional issues in clean-cut and concrete form' *Rescue Army v. Municipal Court*, 331 U.S. 549, 584 (1947)."

Since, as conceded by respondents, this proceeding has become moot, and since none of the exceptions to the mootness doctrine have application, it is submitted that the Court should adhere to previous rulings, declare the case to be moot, and vacate the judgments below.

VII. The Judgment Below Constitutes an Impermissible Interference with Pending State Court Proceedings.

On June 27, 1975, the Town of Lockport commenced an Article 78 proceeding challenging the attempt by the Secretary of State of the State of New York to certify, implement and enforce the 1974 charter. It was not until October 6, 1975 that this Court directed the District Court to consider the question of mootness in light of the 1974 charter. In presumed response to that direction, the District Court entered its declaratory judgment validating the 1974 charter. By that

time, the state court proceeding attacking the validity of the 1974 charter had been pending for six (6) months, and the state court of first instance had already rendered a decision and judgment, from which an appeal was pending. The 1974 charter was never the subject of "any proceedings of substance on the merits" in the federal courts. Thus, the District Court has improperly interfered with a pending state court proceeding.

In *Younger v. Harris,* 401 U.S. 37 (1971), this Court held that federal injunctions against pending state criminal actions can be issued *only* under *extraordinary circumstances* where the danger of irreparable harm is both *great* and *immediate.* In *Samuels v. Mackell,* 401 U.S. 66 (1971), a companion case to *Younger v. Harris, supra,* the Court held that:

> "The same equitable principles relevant to the propriety of an injunction must be taken into consideration by federal district courts in determining whether to issue a declaratory judgment, and that where an injunction would be impermissible under these principles, declaratory relief should ordinarily be denied as well." (401 U.S. 66, at 73).

The basic rationale underlying *Samuels* was a concern that *Younger* would be effectively emasculated by the use of federal declaratory judgments which would have effects identical to those injunctions. As the Court noted:

> "The practical effect of the two forms of relief will be virtually identical, and the basic policy against federal interference with pending state criminal prosecutions will be frustrated as much by a declaratory judgment as it would be by an injunction." (401 U.S. 66, at 73).

The *Younger* doctrine should be applied in the instant case. In *Huffman v. Pursue,* 420 U.S. 592 (1975), this Court held that *Younger* applied to an Ohio civil proceeding, stating:

> "The component of *Younger* which rests upon the threat to our federal system is . . . applicable to a civil proceeding such as this quite as much as it is to a criminal proceeding."

The Court carefully limited the scope of its decision to the particular civil statute at hand, and, thus, left open the much broader question of the applicability of *Younger* to state civil proceedings in general. However, the Court took cognizance of the Federal Circuit Court decisions in which *Younger* has been held to be applicable to state civil proceedings and noted that:

> "The seriousness of federal judicial interference with state civil functions has long been by this Court. We have consistently required that when federal courts are confronted with requests for such relief, they should abide by standards of restraint that go well beyond those of private equity jurisprudence."

If this Court is not prepared to extend the prerequisites to federal interference with state criminal proceedings set forth in *Younger* to *all* civil cases, we submit that those prerequisites should apply to those cases which involve questions of state governmental administration. A showing of either "extraordinary circumstances" or "great and immediate" harm should be as necessary in this class of cases as it is in criminal prosecutions.

Appellants should not be enjoined from proceeding with the state court action challenging the 1974 charter.

28 U.S.C., Section 2283, provides:

> "A court in the United States may not grant an injunction to state proceedings in a State Court except as expressly authorized by Act of Congress or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

The court below attempted to justify its injunction as having been rendered "in order to protect the judgment of

this court". However, the 1974 *per curiam* opinion of the Supreme Court in *Poe v. Gerstein,* 417 U.S. 281 (1974), stands for the proposition that an injunction of state court proceedings to protect the judgment of a federal court is unjustified in the absence of an allegation that the state court would not respect the federal court's judgment.

Here, there has been no allegation that the state court would not respect the federal court's decision. Indeed, the lower state court in the pending Article 78 proceeding felt itself *bound* to accept the decision of the District Court as to constitutionality. In the absence of any indication that the courts of New York State will not respect the federal court's decision, this injunction is improper.

As stated in *Atlantic Coast Line Railroad Co. v. Brotherhood of Engineers,* 398 U.S. 281, 297 (1970):

> "Any doubts as to the propriety of a federal injunction against state court proceedings should be resolved in favor of permitting the state courts to proceed in an orderly fashion to finally determine the controversy. The explicit wording of § 2283 itself implies as much, and the fundamental principle of a dual system of courts leads inevitably to that conclusion."

Moreover, appellants' state proceeding raises issues other than the constitutional issues which were at issue in the District Court, that is, that there were numerous procedural defects in connection with the filing of the 1974 charter which require its revocation and recission (R. Ex. 1). If the injunction is allowed to stand, the Town of Lockport will be forever foreclosed from obtaining a determination of those issues. Certainly it cannot be seriously argued that foreclosure of these procedural issues is necessary to effectuate the judgment of the District Court.

CONCLUSION

The Judgments Below Should be Reversed.

The judgments of the District Court for the Western District of New York entered on January 9, 1975 and on December 18, 1975 should be reversed, and the case remanded with instructions to enter judgment dismissing the complaint. The order of remand should also instruct the District Court to make such orders as may appear appropriate, after hearing the parties, to reinstate the county form of government existing prior to implementation of the 1974 charter.

Respectfully submitted,

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July 1976